United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1357

Corrected Copy

To be argued by
Edward R. Korman

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1357

UNITED STATES OF AMERICA

Appellant,

-against-

SIDNEY SALZMANN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
(Of Counsel)

TABLE OF CONTENTS

TABLE OF CITATIONS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1357

UNITED STATES OF AMERICA,

Appellant,

- against -

SIDNEY SALZMANN,

Appellee.

BRIEF FOR THE APPELLANT

PRELIMINARY STATEMENT

This is an appeal by the United States from an order of the District Court for the Eastern District of New York (Weinstein, J.) which dismissed the indictment in the case before trial on various grounds arising out of an alleged improper delay of the trial (A. 1-107).

STATEMENT OF FACTS

A. INTRODUCTION

This is an unusual case. It began on June 26, 1972, when the defendant, Sidney Salzmann, was indicted for failing to report for induction and for a pre-induction physical and it ended on July 16, 1976, with an order dismissing the indictment on various related grounds arising out of the alleged improper delay in bringing the defendant to trial. The case is unusual because, during this entire period, the defendant, who was aware of the indictment, resided in Israel and mad no effort to return to the United States for arraignment or trial.

So much is undisputed. Indeed, the district court found that there "is no indication in the record that Salzmann has made any serious effort to return to the United States" (A. 76). It is true that in a long post-indictment letter, written to urge the dismissal of the indictment because of his permanent residency in Israel and his impending service in the Israel Defense Forces, the defendant observed that he was not "financially equipped at the present time to undertake a voyage of this nature" to the United States to stand trial; but, his own lawyer, Professor Louis Lusky,

admitted that he did not know "one way or another whether Mr. Salzmann really lacked the money to get to Brooklyn", and that the defendant's claim to this effect was little more than a "self-serving declaration" (A. 130). The record is not only barren of a shred of legally credible evidence in this regard, but an affidavit filed pursuant to the Criminal Justice Act in May, 1976, indicates that the defendant has substantial assets, including a $33,000 cooperative apartment, a $2,000 car, and an interest in a mutual fund valued at $936.00 (A. 120).

Moreover, it is also undisputed that the offense for which the defendant was indicted was not only not an extraditable offense under our treaty with Israel, but that Israeli law, expressly prohibits "surrender for offenses other than those specified in the treaty" (A. 49). Accordingly, there was no legal way, short of Israel's violation of its own law, for the United States to have endeavored to procure the return of the defendant. And, of course, there is not the slightest basis for any belief that Israel would have complied with any such request by the United States to do so.

The 106 page opinion of the district court dismissing the indictment, thus boils down to the following

extraordinary and unprecedented propositions:

1. A defendant, whom the record shows made "no serious effort to return to the United States" to stand trial, and who has not produced a shred of credible evidence to indicate that he was unable financially to do so, may obtain the dismissal of an indictment on the ground that he was denied a speedy trial because the United States did not offer to provide him with transportation to the United States; and

2. The United States is obligated by the Speedy Trial Rules and the Constitution to ask a democratic country, which normally obeys its own law, to violate them, as well as its treaty with the United States. The failure to make such a request, without any showing that it would have been honored, will result in the dismissal of an indictment at the behest of a defendant who has made no showing that he was unable himself to return to stand trial.

These propositions are so extraordinary and unsupported by precedent, that even Professor Lusky backed away from the full implication of the latter proposition (A. 142-143), and the amicus curiae, Michael Tigar,

a leading civil libertarian, told the district court that it "ill become[s] an American court to suggest that our own government [is constitutionally bound] to seek return of fugitives by [such] questionable means" (Memorandum of Amicus Curiae Re: Motion to Dismiss for Denial of Speedy Trial, A. 186).

This, then, is the reason for our appeal, although there are many other errors of fact and law in the opinion, and although we are not unsympathetic to the dilemma which the record indicates Mr. Salzmann may have faced. He desired to live his life in Israel, and he could have avoided his obligation to serve in the Armed Forces by renouncing his citizenship. Yet given the uncertain fate of Israel, his reluctance to abandon American citizenship for himself and his children is understandable. The unfortunate situation in which Mr. Salzmann and others like him find themselves, however, is a matter which the Constitution says should be resolved by Congress and the President. It does not warrant the making of what we believe to be bad law by a well meaning district court judge. As Judge Friendly observed, in commenting upon a similar effort by Judge Weinstein to do what he thought was just, regardless of the law:

> It is of no moment that the judge's motives were of the highest. We do not stop to inquire whether his apparent resentment over the action of the Parole Board was justified or not. It does not matter. In his famous lectures Cardozo told of "le phénomène Magnaud", an episode in which the tribunal of the first instance of Château-Thierry, whose members became known as "les bons juges", initiated a revolt against the existing order in jurisprudence and "asked themselves in every instance what in the circumstances before them a good man would wish to do, and . . . rendered judgment accordingly." The Nature of the Judicial Process 138-39 (1921). He concluded that
>
> > [w]hatever the merits or demerits of such impressionism may be, that is not the judicial process as we know it in our law.
>
> Id. at 135 (footnote omitted).

D'Allesandro v. United States, 517 F.2d 429, 435 (C.A. 2, 1975).

B. THE PRE-INDICTMENT PROCEEDINGS

The defendant, after having obtained a deferment from the draft to undertake rabbinical study, apparently decided not only to give up those studies, but to leave the United States permanently and reside in Israel. Because of these changes in his status, on January 20, 1970, the defendant was classified 1-A. On March 3, 1970 he was ordered to report for a pre-induction physical examination on May 3, 1970, in Jamaica, New York. On April 30, 1970, after having been advised that he could take his pre-induction physical in Livorno, Italy (A. 176a), Mr. Salzmann wrote to his local board asking whether he would be "eligible for a

4-D classification if I resume my studies at this time" (A. 176b). He requested a response prior to May 27, 1970, the date scheduled for his pre-induction physical in Livorno. He was advised by the local board on May 6, 1970, to submit verification of the fact that he had resumed attendance as a full time divinity student, and that he should, nevertheless, report for his physical examination (A. 176c).

The defendant did not submit the verification requested, nor did he report for the pre-induction physical. Instead, more than six months later, on December 17, 1970, he wrote to the local board belatedly asserting that his failure to report as ordered was due to his inability to pay the airfare from Israel to Livorno, Italy (A. 177). Although he apologized for his tardiness in replying to a letter from the local board dated June 30, 1970 (A. 176d), relating to his failure to report for the pre-induction physical, he never explained the reason why he waited so long to do so.

The defendant was ordered to report for induction on January 18, 1971. This he failed to do, although he wrote to the local board to tell them that he had no means at his disposal to comply with the order to report for induction (A. 180). His letter continued with a statement of his desire to live and remain in Israel permanently and he concluded with the hope that his impending service in the

Israel Defense Forces would allow his case to be closed legally. On February 3, 1971, he was advised by the local board that, as a result of his failure to report for induction, the matter was being referred to the United States Attorney (A. 181).

At the time of all these events, there was no procedure authorizing travel assistance to registrants who were outside the United States to enable them to return to the United States to report for induction. On June 14, 1971, after the defendant failed to report for induction, and after the case had been referred to the United States Attorney, regulations were promulgated which permitted a registrant to report to the nearest military air base closest to his overseas residence and from there he would be provided transportation to a collection point for processing, and ultimately be transported to the United States (A. 5-6). Like the procedure permitting pre-induction physicals to be taken at overseas bases near the registrant's overseas residence, however, it did not provide for furnishing transportation to the nearest military base. The defendant, who was allegedly unable to travel to the military facility in Italy for his pre-induction physical, was not advised of his change in procedure prior to his indictment.

C. THE POST-INDICTMENT PROCEEDINGS

1. The indictment was returned on June 26, 1972. The defendant failed to appear for arraignment as directed on August 17, 1972. On September 25, 1972, he wrote a long letter to the United States Attorney. The letter began by explaining that arraignment notice arrived only a day before he was scheduled to appear and that it was, therefore, impossible for him to appear as directed. The letter continued: "In addition to this I should mention that I am not financially equipped at the present moment to undertake a voyage of this nature" (A. 121). There then followed an explanation for the defendant's decision to leave the United States. Mr. Salzmann stated that his decision to leave the United States was not based on a desire to avoid the draft, but was the culmination of "many years of Zionist training and upbringing." The letter continued (A. 122):

> "I believe that I have the basic right to live in the country of my choice and especially in Israel, which is the historic homeland of my people. On the other hand, having been born in the United States, I feel U.S. citizenship to be my privilege and in no way wish to reject it."

Mr. Salzmann then observed that his service in the Israel Defense Forces was imminent and he concluded with a request that the charges against him be dropped. This he was advised

was not possible.

2. This case was assigned to Judge Weinstein immediately after the indictment was returned and he issued a warrant for the defendant's arrest. Judge Weinstein, however, does not simply ignore his fugitive cases. As he explained earlier in these proceedings:

> "In controlling my own calendars one procedure relied upon to guarantee prompt disposition of cases is to periodically call each fugitive case to determine if (1) the government is making reasonable efforts to apprehend the fugitive, (2) the public or defendant is being prejudiced by unnecessary delay, and (3) cases which should be dismissed are carried on the docket, artificially inflating the court's and prosecutor's apparent case load.
>
> All the fugitive cases before me are in the process of being called. Previously such calls have led to dismissals and action by the government to apprehend defendants. The government has never objected to these calendar calls and the court deems them essential to properly control its calendar."

United States v. Lockwood, 382 F. Supp. 1111, 1113 (E.D.N.Y. 1974), mandamus granted, sub nom. United States v. Weinstein, 511 F.2d 622 (C.A. 2, 1975), certiorari denied, sub nom. Austin v. United States, 422 U.S. 1042, (1975).

On September 10, 1974, Judge Weinstein not only announced his intention to call each fugitive Selective Service case, including the present case, but he assigned

counsel to represent them as well. Moreover, he announced that he would allow them to undertake pretrial discovery and make motions to dismiss the indictment United States v. Lockwood, supra, 382 F.Supp. at 1115). The reason for this is somewhat ironic. Here Judge Weinstein found that the defendant Salzmann suffered "special prejudice" (A. 85) because of his inability to avail himself of the amnesty program. This prejudice he attributed to the alleged improper trial delay. In September, 1974, however, Judge Weinstein concluded that the amnesty program offered no advantage over a criminal prosecution (United States v. Lockwood, supra, (382 F.Supp. at 1115):

> "It is significant that in 1973 in the country as a whole more than two-thirds of the Selective Service indictments terminated were dismissed. Only seven percent of defendants whose cases were disposed of by the courts were imprisoned; the average term was 17.5 months before the time off for good behavior. Many of those convicted were sentenced under the Youth Correction Act so that, upon completion of their supervision, they were granted a certificate setting aside their conviction. 18 U.S.C. §5021. It is apparent that the overwhelming majority of those indicted whose cases were disposed of by the courts in 1973 received more "lenient" treatment than would be accorded under the President's proclamation. There is no reason to suspect that the clear trend against severity in these cases will be reversed in 1974."

Accordingly, Judge Weinstein feared that fugitive Selective Service defendants, who were ignorant of their rights, might submit to the amnesty program, when they had potential defenses available to them. Therefore, he concluded: "Both from the point of view of effective calendar control and protection of the rights of those accused of draft evasion, it is desirable to screen these cases to determine if they have any merit" (United States v. Lockwood, supra, 382 F.Supp. at 1115).

On January 30, 1974, this Court issued a writ of mandamus prohibiting Judge Weinstein from undertaking such action without the authorization or consent of the defendants whose cases he had unilaterally activated. United States v. Weinstein, 511 F.2d 622, (C.A. 2, 1975), certiorari denied, sub nom. Austin v. United States, 422 U.S. 1042 (1975). In so doing the Court wrote (511 F.2d at 628-629):

> "The administration of justice is not served by the court's unilateral effort to activate the defense of a criminal case in which prosecution has been frustrated by the defendant's flight from the jurisdiction. In the present cases, for instance, the dormant files are mere statistics which do not preclude the active prosecution of hundreds of other pending viable criminal cases against person located within the jurisdiction. Nor should the pendency of indictments against fugitives who may be innocent inhibit them from returning to the jurisdiction or coerce them into the performance of alternate service under an amnesty plan. The remedy of a guiltless

> fugitive, assuming some of the defendants may be so classified, is to avail himself of his Sixth Amendment right to a speedy and public trial, with all the constitutional guarantees associated with it. The Government's failure to prove guilt beyond a reasonable doubt will then lead to his acquittal. In the meantime, no public interest is served by proceeding without his consent or authorization.

3. On November 26, 1974, before the writ of mandamus was issued, Judge Weinstein had entertained and denied motions on behalf of the fugitive defendants, including Mr. Salzmann, which alleged that they "had been denied a speedy trial in violation of [their] Sixth Amendment rights, even though prompt trials had been rendered impossible by the defendants having fled the jurisdiction and their never having sought a trial" (United States v. Weinstein, supra, 511 F.2d at 625-626).

In denying initially the motion to dismiss the indictment, without prejudice to later renewal, Judge Weinstein found that the failure of the United States to make futile requests for the return of Selective Service defendants, who had taken refuge in other countries, "does not appear unreasonable." United States v. Lockwood, 386 F.Supp. 734, 737 (E.D.N.Y. 1974). Moreover, Judge Weinstein observed that "[n]o claim has been made of a violation of the Eastern District of

New York's Plan for Achieving Prompt Disposition of Criminal Cases" United States v. Lockwood, 386 F.Supp. 734, 737 (E.D. N.Y. 1974). Nor was any such claim ever raised by the defendant Salzmann, until Judge Weinstein again raised the issue himself on January 6, 1976, in an order inviting the parties to comment on it.

Moreover, although the initial speedy trial motion was denied on November 26, 1974, and although the defendant was represented by counsel authorized to act on his behalf since December, 1974, the motion to dismiss the indictment on speedy trial grounds was not renewed until July 31, 1975. The motion was not decided until July 16, 1976. No explanation was offered for this delay in making the motion to dismiss or in deciding it, although Judge Weinstein includes the entire period within the ambit of his finding of unreasonable delay. Moreover, during this period, the time in which the defendant could have availed himself of the amnesty program passed. Indeed, under the policy followed by our office, while the amnesty program was in effect, the defendant could have returned home and stood trial first, before deciding whether to undertake the alternative of enlisting in the amnesty program.

D. THE ORDER OF D. MISSAL

The order dismissing the indictment rested on four separate grounds arising out of the alleged delay in affording the defendant a speedy trial.

First, Judge Weinstein found that the Speedy Trial Rules had been violated because a notice of readiness was not filed within six months of the indictment (A. 7-72). Since the United States was aware of the defendant's place of residence, it could avail itself of the tolling provisions of Rule 5 only by showing that it had exercised "due diligence" to obtain the defendant's return. Due diligence in this case, the district court held, either was an offer to the defendant of transportation to the United States to stand trial, or a request to Israel to violate its own law and its treaty with the United States, by returning Salzmann to the United States. Accordingly, a defendant who, in a letter to the United States Attorney hardly expressed anything but an intent to return to the United States to stand trial, and who submitted no proof of his alleged financial distress, was held entitled to obtain a dismissal of his indictment because the United States had failed to file a meaningless piece of paper indicating, what was in fact the case, that it was ready for trial which could not take place. It is no wonder that it took Judge Weinstein 65 pages to show that this result was justified by the Speedy

Trial Rules.

Second, relying largely on the same factors which he claimed failed to satisfy the due diligence requirements of the Speedy Trial Rules, Judge Weinstein held that the Speedy Trial Clause of the Sixth Amendment had been violated (App. 73-93). Here, Judge Weinstein also relied upon "special prejudice" suffered by the defendant as the result of the delay of the trial (App. 85):

> "In addition, Salzmann has suffered a special prejudice. As was noted in some detail in the course of a discussion of the Speedy Trial Rules, supra, Salzmann cannot take advantage of two options available to other draft offenders to excape prosecution. The United States Attorney is no longer able to offer submission to induction into the Armed Forces or participation in the Amnesty program. The severity of this prejudice is obvious."

Although the severity of this prejudice may have belatedly become obvious to Judge Weinstein, he never explained how it precisely related to any delay of the trial. The defendant could have availed himself of the amnesty program without ever having stood trial. Similarly, a trial and conviction was not a prerequisite for a defendant who decided to submit to induction as an alternative to facing trial. Accordingly, it is not surprising that Judge Weinstein was not content to rely only on the Speedy Trial Clause.

Third, Judge Weinstein found that there had been unreasonable delay in prosecution within the meaning of F.R.

Crim.P. Rule 48(b) (Op. 94-104). Here he added a new consideration as a basis for invoking Rule 48(b) as an independent basis for dismissal. Although only post-indictment delay is included within the ambit of Rule 48(b), and although this Court has repeatedly held that claims of unreasonable post-indictment delay are substantially coterminous with claims of a violation of the Speedy Trial Clause, Judge Weinstein held that pre-indictment delay could be considered here because of the interplay between Rule 48(b) and Section 462(a) of Title 50 (U.S.C. App). Section 462(a) provides:

> "The Department of Justice shall proceed as expeditiously as possible with a prosecution under this section, or with an appeal, upon the request of the Director of the Selective Service System or shall advise the House of Representatives and the Senate in writing the reasons for its failure to do so."

Fourth, Judge Weinstein relied on the alleged failure to comply with Section 462(a) as an "independent basis" to dismiss the indictment (A. 104-105). Judge Weinstein was apparently untroubled by the record, including the Selective Service file (A. 175-176) and an affidavit of an Assistant United States Attorney (A. 124-126), which showed that this prosecution was not commenced "upon the request of the Director of the Selective Service System."

ARGUMENT

POINT I

THE SPEEDY TRIAL RULES WERE NOT VIOLATED HERE

1. The district court devoted approximately 20 of the 106 pages of the memorandum and order dismissing the indictment to a discussion of the history of the Speedy Trial Rules. The only relevant consideration to be drawn from that history, however, may be stated in one sentence. To quote Judge Oakes:

> "The Rules are designed only to insure prosecutorial readiness for trial; the constitutional guarantee and Rule 48(b) protect against the loss of speedy trial rights from whatever cause."

United States v. Infanti, 474 F.2d 522, 528 (C.A. 2, 1972).

The United States here was ready for trial from the date of the indictment. Indeed, since it is never disputed in Selective Service cases that the defendant failed to report for induction, the case-in-chief amounts to little more than the introduction of the Selective Service file into evidence. The United States, however, did not notify the district court of its readiness, as is its practice, because, as Judge Weinstein was aware at the time, the defendant had not complied with the notice to appear for arraignment, and the case was carried by him in the status of a "fugitive" case. A formal statement of readiness would thus have been

a useless act, since it would not have advanced the trial of this case one day. And, indeed, since September 20, 1974, when we orally advised the district court of our readiness for trial (A. 128), when the case was called for a status report, no trial had been scheduled.

The initial question, before dealing with the issue of whether the tolling provisions of Rule 5 are applicable, is whether a notice of readiness was required in a case such as this. The express requirement that a notice of readiness be filed is nowhere to be found in the Speedy Trial Rules; this salutary rule is simply part of the judicial gloss which has been put upon the Speedy Trial Rules so that the district court may be apprised of this fact and act accordingly. United States v. Bowman, 493 F.2d 594 (C.A. 2, 1974); United States v. Pierro, 478 F.2d 386 (C.A. 2, 1973). But the very case which initally engrafted this requirement on the Speedy Trial Rules also made it clear that it would be applied in a common sense way.

In United States v. Pierro, supra, it was held that a dismissal of the indictment was not justified where the defendant had not been advised of the readiness of the United States for trial (although the district court had been so informed). Chief Judge Kaufman, writing for the Court, observed that the Speedy Trial Rules "were not intended to straightjacket the administration of criminal justice in the federal courts, nor were they designed to place obstacles

in the path of legitimate law enforcement efforts and thus thwart the compelling interest in criminal prosecution." It was never intended, the Chief Judge wrote, that "technicalities would carry the day (478 F.2 at 389)." Cf. United States v. Rodriguez, 529 F.2d 598, 600 (C.A. 2, 1976).

Yet that is precisely what has happened here. A notice of readiness would simply have been a meaningless gesture because the district court could not have called the case for trial. Moreover, it is respectfully submitted, it is simply offensive to public policy to permit a defendant who took up residence in a foreign country and who has not made any showing that he was unable to come to the United States to stand trial, to invoke such an obvious technicality.

2. We also believe that, assuming a notice of readiness was required, the defendant's unavailability for trial tolled the time for filing a notice of readiness. Pursuant to Rule 5(d) of the Speedy Trial Rules, the period of time in which a defendant is unavailable for trial is excluded from computing the time in which the government must be ready for trial. A defendant is considered "unavailable whenever his location is known, but his presence for trial cannot be obtained by due diligence."

We submit that before a district court invokes the "unsatisfactorily severe remedy" of dismissal (Barker v. Wingo, 407 U.S. 514, 522 [1972]), because of the failure to exercise due diligence to procure the return of a defendant who is outside the process of the district court and the jurisdiction of the United States, it must be shown that there were reasonable steps that could have been taken which would have resulted in his return to the United States. For surely "due diligence" must mean something more than a useless act. Here the district court found there were two such steps which could have been taken. First, it held that the defendant should have been offered free transportation to the United States, and, second, that a request for his surrender or expulsion should have been made to Israel. On the record here, we submit there is no basis whatever for concluding that the failure to take either of these steps constituted a failure to exercise "due diligence."

a. To be sure, in a letter to the United States Attorney which quite plainly suggested that he had no intention of returning to the United States, the defendant indicated that "at the present time" he was not "financially equipped" to come to the United States to stand trial (A. 121). But the remedy

of dismissal is hardly appropriate, for failure to respond to this "self-serving" statement (to use Professor Lusky's words), without some showing that the defendant was acting in good faith, i.e., that the reason he failed to appear was that he was without funds to do so. Absent such a showing, there is simply no reason to believe that an offer of free transportation would have procured his presence. Accordingly, while we concede that, if the reason that the defendant failed to appear was his financial inability to make the trip to the United States, then "due diligence" required that he be offered the monies to do so, here, to quote Professor Lusky, we do not know "one way or another whether Mr. Salzmann really lacked the money to get to Brooklyn" (A. 130). In short, there is no basis to support a conclusion that the defendant acted in good faith and failed to appear for trial because he did not have the funds to do so.

b. There is no dispute that, as the district court observed: "Article 21 of the Israeli Extradition Act prohibits surrender for offenses other than those specified if a treaty requires enumeration, as does the Extradition Convention Between Israel and the United States." (A. 49). Since the offense with which the defendant was charged is not enumerated in the treaty between Israel and the United States, a request to Israel for Mr. Salzmann's surrender would have meant asking

Israel to violate its own law. Accordingly, no such request was made. As the district court was advised, in an affidavit dated June 6, 1976, which was filed by the Department of Justice Attorney responsible for handling extradition matters (A. 119):

> "Specifically in the matter involving the defendant in this case, it is my expert opinion that it would have been fruitless to request the defendant's extradition. Further, to make such a request would cause an embarrassment to this Government because it would have realized prior to presentation of a requisition for surrender that the Israeli Government was required by law to reject it."

We submit that "due diligence" does not require the United States to ask a soverign democratic state to violate its own law. The "imperative of judicial integrity" is hardly served when a United States District Court Judge tells the Executive Branch that it is legally compelled to engage in such activity, and this is so regardless of whether or not it would have been successful in obtaining the defendant's presence. As the amicus curiae, Michael Tigar aptly put it: "[I]t would ill become an American court to suggest that our government seek return of fugitive by questionable means." Memorandum of Amicus Curiae Re: Motion to Dismiss For Denial

of Speedy Trial (A.186). 1/

Moreover, there is nothing in the record to support, what can charitably be characterized as wholly unsupported, the finding that "[t]here is a reasonable probability that Israel would have cooperated in the return of Salzmann had it been asked to do so" (A. 55). The affidavit referred to earlier stated that it would have been "fruitless" to request his surrender. And, no evidence to the contrary was adduced.

The case of Meyer Lansky, the only post-treaty case cited by the district court to support this finding,

---

1/ Indeed Judge Weinstein had himself previously found that the failure to take such action was not unreasonable. United States v. Lockwood, supra, 386 F.Supp. at 737:

> "We take judicial notice of the fact that the governments and populace of the countries in which many draft fugitives sought asylum had expressed antipathy toward this country's participation in the Vietnam war. See, e.g., N.Y. Times, Nov. 3, 1974, §6 (Magazine), 51, 66. American public opinion was also divided. Pressing strenuously for extradition might have seriously exacerbated feelings of hostility both at home and abroad. Given the serious doubt about whether any extradition treaty applied to what these other countries may have considered political rather than criminal offenses, the decision not to seek extradition in all cases does not appear unreasonable."

is plainly distinguishable. In that case, Lansky was refused a visa necessary to allow him to remain in Israel, under a provision of the Law of Return, because he was found to be "a person with a criminal past, likely to endanger public welfare". The Supreme Court of Israel held that "on the cumulative evidence", the Minister of Justice "was perfectly authorized to find himself satisfied that the petitioner had a criminal past; that he had been closely linked to organized crime; and that there was reasonable ground to apprehend that were he allowed to remain in Israel, he would endanger public welfare in this country." Klein, The Lansky Case, 8 Israel Law Rev. 286, 294. This description hardly fits Mr. Salzmann. 2/ Moreover, given the controversy in Israel which was caused by the expulsion of so notorious a figure as Meyer Lansky (Klein, The Lansky Case, supra, 8 Israel Law Rev. at 294-295), the suggestion that Israel would have agreed to expel Mr. Salzmann even if it legally could have done so, is incredulous.

In summary, there is no basis, on the record here, to dismiss this indictment because of failure to comply with

---

2/ The case of Soblen, a convicted spy, was a pre-treaty case, which involved the denial of a visa under the same provision of the Law of Return. Klein, The Lansky Case, supra, 8 Israel Law Rev. at 288, n.8.

the Speedy Trial Rules. Not only do we believe that the notice of readiness requirement has no applicability to a case such as this, but even if it does, the delay was attributable to the defendant's unavailability for trial. Having placed himself beyond the process of the district court and the jurisdiction of the United States, there is nothing in the record to indicate that the United States could have procured the defendant's return in a lawful way. 3/

3/ The two cases relied upon by the district court are inapposite here:

1. Smith v. Hoey, 393 U.S. 374 (1969) involved a defendant who was incarcerated in a federal penitentiary from which the State of Texas made no effort to procure his presence. Not only was this a case in which the record established that the defendant was unable to appear voluntarily for trial, but, as even Judge Weinstein recognized: "The practical relationship between state authorities and between state and federal authorities differs from that between our government and a foreign government." United States v. Lockwood, supra, 386 F.Supp. at 737. See, also, Mancusi v. Stubbs, 408 U.S. 204, 212 (1972).

2. United States v. McConahy, 505 F.2d 770, 773 (C.A. 7, 1974), likewise involved a defendant who was incarcerated and who was unable to appear voluntarily for trial. Although he was incarcerated in England and the offense for which he was charged was not covered by our extradition treaty, the Court of Appeals held that a request should have been made for his return for trial as a matter of comity. In the McConahy case, however, there was no suggestion that British law would have been violated by such a surrender and, unlike here, the defendant submitted some evidence that such a request would have been honored, and the prosecution offered nothing to the contrary "in the form of expert testimony" or otherwise (505 F.2d at 770).

POINT II

THE SPEEDY TRIAL CLAUSE WAS NOT VIOLATED

We need not engage in an extensive discussion of the various factors which must be considered in weighing a claim that the Speedy Trial Clause has been violated (see Barker v. Wingo, 412 U.S. 514 [1972]), for there is simply no basis for a finding that the Speedy Trial Clause was violated here. The defendant here was apprised of the pending indictment against him and, as Judge Weinstein found, "there is no indication in the record that Salzmann has made any serious effort to return to the United States" (A. 76). Nor does the record show that anything more could have reasonably been done by the United States that would have led to his return for trial. Indeed, under the circumstances thus far disclosed, it must be assumed that the reason there has been no trial was the voluntary refusal of the defendant to appear for trial.[4/] Cf. Taylor v. United States, 414 U.S. 17, 19-20 (1973).

4/ There is no doubt that the defendant would have received a speedy trial if he had returned. As Judge Weinstein observed:

> "We take judicial notice of our own court records establishing that where defendants have appeared, the government has prosecuted selective service cases no less expeditiously than other kinds of cases."

United States v. Lockwood, supra, (386 F. Supp. 738).

Moreover, there was no significant prejudice suffered here of the kind against which the Speedy Trial Clause protects. In Barker v. Wingo, supra, 407 U.S. at 532, the Supreme Court observed:

> "A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."

Here there was no pretrial detention, nor was there any impairment shown to the defendant's ability to prepare a defense. And, even the anxiety and concern which an accused normally faces must have been minimized somewhat by the security of knowing that as long as he remained in Israel, where he had chosen to live his life, he would never be prosecuted.

The district court, perhaps concerned with the absence of any significant definable prejudice of the kind about which the Court spoke in Barker v. Wingo, suggested that the delay in trial prevented the defendant from participating in the amnesty program and taking advantage of the option to avoid prosecution by submitting to induction. But even assuming, contrary to Barker v. Wingo, that this is the prejudice that the Speedy Trial Clause is concerned with,

we do not understand how the delay in trial prevented the defendant from availing himself of either of these options. A trial or conviction was simply not a prerequisite to either program. Moreover, as a practical matter, the defendant has benefited significantly from the delay. The sentence that would be imposed today, as Judge Weinstein recognized, is far less severe than that which would have been imposed in 1971 or 1972 while the United States was still involved in the Vietnam War. United States v. Lockwood, supra, 382 F.Supp. at 1115.

There is, in short, no basis for a finding that the Speedy Trial Clause has been violated.

POINT III

RULE 48(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WAS NOT VIOLATED

There is, of course, no more basis for finding a violation of Rule 48(b) based on "unnecessary delay" in prosecution than there is for finding a violation of the Speedy Trial Clause. Indeed, claims of a violation of these provisions are treated as "substantially coterminous." United States v. Infanti, supra, 474 F.2d 527; United States v. Favalaro, 493 F.2d 623, 626 (C.A. 2, 1974). Judge Weinstein, in an effort to bolster his conclusion that Rule 48(b) had been violated added two new elements to his discussion.

Although he acknowledged that pre-indictment delay does not come within the ambit of Rule 48(b), Judge Weinstein concluded that such delay (17 months here) may be considered because of the "special nature of selective service cases" (A. 98):

> "There exists ample authority, however which would enable defendant Salzmann to complain not only of the second, but also the first of the three periods of delay, the 1-1/3 years from the time of the local board's referral of the case for prosecution to the filing of an indictment. Entirely consistent with the Marion decision, this authority depends on the special nature of selective service cases in order to apply a more stringent standard of expeditiousness to the government.

> All prosecutions of selective service cases are subject to a special statute mandating expeditious prosecution. The Selective Service Act of 1967 provides:
>
> > 'The Department of Justice shall proceed as expeditiously as possible with a prosecution under this section, or with an appeal, upon the request of the Director of the Selective Service System or shall advise the House of Representatives and the Senate in writing the reasons for its failure to do so.'
>
> 50 U.S.C. App. § 462(c)."

The apparent reason that Judge Weinstein found it necessary to consider the pre-indictment delay, was yet another element of alleged prejudice which he discovered. On December 10, 1972, a little more than two months from the date of the defendant's letter to the United States Attorney claiming that he was not at the present time financially able to come to the United States, and less than six months from the date of the indictment, the defendant turned twenty-six. He was, therefore, ineligible for sentence under the Youth Corrections Act (A. 103). The advantage to such a sentence is that the judgment of conviction could have been expunged after the defendant's successful completion of the sentence. Perhaps because he felt that the short period of time that had elapsed since the date of defendant's letter to the United States attorney regarding his financial indisposition

(September 25, 1972) would not have justified attributing this prejudice to any "unnecessary" post-indictment delay, or perhaps because this prejudice is not of the kind which the Supreme Court enumerated in Barker v. Wingo, supra, Judge Weinstein found it necessary to drag the pre-indictment delay into the picture.

There is simply no basis for including any pretrial delay within the ambit of Rule 48(b). As Judge Weinstein acknowledged, Rule 48(b) is applicable solely to post-indictment delay. United States v. Marion, 404 U.S. 307, 319 (1971). Moreover Section 462(a) is not applicable here because this prosecution was not commenced at the "request of the Director of the Selective Service System"; it was commenced after the local board forwarded a Delinquent Registration Report (SSS Form 301) to the United States Attorney (A. 124, 175).

The apparent purpose of Section 462(a) was to compel the Department of Justice to account to Congress for its refusal to honor a request for prosecution where the request has been made by the Director of the Selective Service System himself. As the Armed Services Committee of the House of Representatives stated in its report (H.R. 90-267

[emphasis added]):

> The provisions of this subsection would require the Department of Justice to institute as expeditiously as possible prosecution and judicial proceedings of violations of the Draft Act in instances in which a specific request for such action has been made by the Director of Selective Service or in the absence of such prosecution by the Attorney General, a complete report in writing to the House of Representatives and the Senate. 5/

Moreover, it seems apparent both from the language of the Act, and its legislative history, that it was intended to insure "continued public confidence in law and to preclude a possible public impression that public officials condone violation of its provisions" (id.); and that it was not intended to afford a delinquent registrant a defense to an indictment for violating the Selective Service Act. Instead, the only consequence of a refusal to honor a "specific" request of the Director of the Selective Service System was the obligation to explain to Congress the basis of the refusal to act. Quite obviously such an extraordinary remedy was not intended, as the district court's opinion suggests, in every case where a local United States Attorney declined prosecution in a Selective Service case and asked the local board to cure some defect which he may have found in the proceedings.

Accordingly, it is not surprising that the two courts of appeals that have considered the issue have held Sections 462(a) to be inapplicable where the prosecution has not been commenced at the express request of the Director for the Selective Service System. United States v. Pereira, 524 F.2d 969 (C.A. 5, 1976); United States v. Colon, 511 F.2d 298 (C.A. 5, 1975), certiorari denied, 421 U.S. 922. 6/

In sum, we submit that Section 462(c) provides no basis for including the pre-indictment period in the equation. Moreover, if the potential advantage of the Youth Corrections Act treatment was lost, it was due to the defendant's own failure to make any serious effort to return to the United States. Finally it seems to us that this element of prejudice, if caused by unjustified pre-indictment delay not covered either by the Speedy Trial Clause or Rule 48(b), can be cured with a remedy less drastic than a dismissal of the indictement, i.e. an order providing for the expungement of any conviction after any sentence has been satisfactorily completed.

6/ Judge Weinstein did not cite either of these cases in his long scholarly opinion.

POINT IV

SECTION 462(a) OF TITLE 50 U.S.C. APP WAS NOT VIOLATED

Section 462(c) of Title 50, U.S.C. App. which we have quoted above, was also relied upon as an "independent basis" for the dismissal of the indictment. Since, as we have shown that this statute is inapplicable, the conclusion is clearly erroneous.

CONCLUSION

The judgment of the district court should be reversed and the indictment reinstated.

Dated: August 16, 1976.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

EDWARD R. KORMAN
Chief Assistant United States Attorney
(Of Counsel).